IN THE

Supreme Court of the United States

October Term, ~~1948~~ 1949

No. ~~431~~ 13

UNITED STEELWORKERS OF AMERICA, C. I. O., *et. al.*,
Petitioners

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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OPINIONS BELOW

The opinions of the Court of Appeals (R. 82 and 110) are reported at 170 F. 2d 247. The decision and order of the National Labor Relations Board are set out at R. 1.

JURISDICTION

The decree of the Court of Appeals (R. 118) was entered in two separate proceedings for review of the Board's order, which had been consolidated in the court below (R. 77). One of these proceedings (No. 9612 below, No. 435 here) was brought by Inland Steel Company to review the order of the Board directing it to bargain collectively with respect to its pension and retirement policies. The other proceeding (No. 9634 below, No. 431 here) was brought by United Steelworkers of America, CIO, by its President, Philip Murray, Local Unions Nos. 1010 and 64, United Steelworkers of America, CIO, and members of United Steelworkers of America, CIO (herein collectively called the Union), to review a provision of the Board's order conditioning its effectiveness upon com-

pliance by the Union, within thirty days, with the requirements of Section 9(h) of the National Labor Relations Act. The decree below enforced the order of the Board in all respects.

The decree below was entered on October 28, 1948. On November 24, 1948, the Union filed its petition for certiorari in the present case, No. 431, to review the decision of the Court of Appeals in so far as it sustained the provision in the Board's order conditioning its effectiveness upon compliance by the Union with Section 9(h). This petition for certiorari was granted on January 17, 1949. The jurisdiction of this Court rests upon 28 U. S. Code § 1254, and upon Sections 10(e) and (f) of the National Labor Relations Act.

On November 26, 1948, the Company filed a petition for certiorari, No. 435, to review the decision of the court below enforcing the order of the Board that it bargain collectively with the Union with respect to its pension and retirement policies. This petition has not been acted upon by the Court.

QUESTIONS PRESENTED

Section 9(h) of the National Labor Relations Act, as amended by the Taft-Hartley Act, subjects a union to certain penalties and disabilities unless each of its officers has filed an affidavit disclaiming belief in or affiliation with communism. Among the sanctions are: (1) The remedies otherwise available under the Act for the redress of unfair labor practices by employers are withheld; (2) The union shop is forbidden; (3) Certain types of strikes and boycotts, otherwise legal, are prohibited; and (4) Non-complying unions are excluded from participating in Labor Board elections, which are so conducted as to favor a competing complying union.

The question presented is whether Section 9(h) is unconstitutional, for any one of the following reasons:

(1) Because it deprives unions, union officers, and members of unions, of freedom of thought, speech, and assembly, in violation of the First Amendment, and of freedom to engage in political activity, in violation of the Ninth and Tenth Amendments, of the Constitution.

(2) Because it is vague and indefinite, and imposes tests

of guilt by association, in violation of the First and Fifth Amendments.

(3) Because it constitutes a bill of attainder, within the meaning of Article I, Section 9, Clause 3, of the Constitution.

The two latter bases for challenging the provision's constitutionality are fully covered in the briefs for the Appellants in No. 336, and, for the sake of brevity, only the first point will be covered in this brief.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Argument.

STATEMENT

Upon the basis of an amended charge filed on August 16, 1946, the National Labor Relations Board issued a complaint, dated August 19, 1946, against Inland Steel Company, alleging that the Company had engaged in and was engaging in certain unfair labor practices affecting commerce within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act.

On January 8, 1947, the Trial Examiner issued his intermediate report finding that the Company had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, including bargaining collectively with the Union with respect to its pension and retirement policies.

The Taft-Hartley Act, the "Labor Management Relations Act, 1947" (Public Law 101, 80th Congress, 1st Sess., 61 Stat. 136, 29 U.S.C.A. Sec. 141 *et seq.*) became effective on August 27, 1947. It re-enacted and amended the National Labor Relations Act. Among the provisions added to the old Act by the Taft-Hartley Act are Sections 9(f), (g) and (h). Section 9(h) provides in part as follows:

> (h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor

> organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods.

Section 9(f) and (g), which are not involved in this case, impose upon labor organizations certain obligations, subject to the same sanctions as are imposed by Section 9(h), to file information with the Secretary of Labor relating to the finances of labor organizations, their internal affairs and structure.

On April 12, 1948, the Board sent to the parties by mail its decision and order (R. 1). The Board's order is prefaced by the following statement (R. 20):

> The Union has not complied with the provisions of Section 9(f), (g) and (h) of the amended Act. Our remedial order therefore shall be in part conditioned upon its complying with that section of the amended Act, within 30 days from the date of the order herein.[1]

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[1] In thus conditioning its order the Board cited *Matter of Marshall & Bruce Co.*, 75 N.L.R.B. 90, where the Board held that, while the failure of a union to comply with Section 9(f), (g) and (h) of the Act in a case based upon a complaint issued before the passage of the Act does not impair the power of the Board to issue remedial orders in view of the prospective language of the amendments to the Act, an order requiring an employer to bargain collectively with a labor organization looks toward a future relationship and is tantamount to a certification. The Board held therefore that it would not effectuate the policies of the Act to place the union in the position of a newly certified bargaining representative unless and until it qualifies for certification. The Board stated:

> We are convinced that Sections 9(f), (g) and (h) not only provide procedural limitations upon the Board's power to act with respect to cases arising after the effective date of the amendment, but also embody a public policy denying utilization of the Board's processes directly to aid the bargaining position of a labor organization which has failed to comply with the foregoing Sections. We cannot believe that Congress intended the full force of Gov-

The order, in brief summary, requires the Company to bargain collectively with the Union with respect to its pension and retirement policies if and when the Union shall have complied, within 30 days from the date of the order, with Section 9(f), (g) and (h). The Company is likewise ordered, subject to the same condition, to refrain from making any unilateral changes affecting the employees represented by the Union in its pension and retirement policies without prior consultation with the Union and to bargain with the Union with respect to its pension and retirement policies. The Company is also required by the Board's order to post certain notices for a period of 30 days following the receipt of said notices and, in the event of compliance by the Union, for 30 days thereafter.

On May 14, 1948, the Union filed with the Board a document (R. 56) entitled "Return by United Steelworkers of America to Conditional Order of National Labor Relations Board," in which the Union recited that it had complied with Section 9(f) and (g) of the Act within the time limitations prescribed in the Board's Decision and Order of April 12, 1948, and its Rules and Regulations.* The Union further recited in its Re-

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ernment to be brought to bear upon an employer to require him to bargain in the future with a Union which we now lack the authority to certify. Therefore, inasmuch as this Union has not complied with Section 9(f), (g) and (h) and is not presently qualified for certification as bargaining representative, our remedial order in this proceeding shall in part be conditioned upon compliance by the Union with that Section of the amended Act, within 30 days from the date of the order herein.

We have not in this case challenged the Board's order on the ground that it applies the Taft-Hartley Act retroactively, since the decisions of the courts are unanimous that that Act is to be given effect, even in cases arising before its enactment, in the shaping of remedial orders which operate *in futuro*. *Young Spring & Wire Corp.* v. *N.L.R.B.*, 163 F. 2d 905 (Ct. App. D.C.); *Edward G. Budd Mfg. Co.* v. *N.L.R.B.*, 332 U. S. 840.

*Under Section 203.86 of the Board's Rules and Regulations, it is provided:

> Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after service of a notice or other paper upon him, and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

Since the Board's order of April 12, 1948 was served upon the Union by mail, its Return of May 14, 1948 was timely.

turn that it had not complied with the requirements of Section 9(h) of the Act, as amended, for the sole reason that the provisions of Section 9(h) are illegal, unconstitutional and void. The Union therefore requested the Board to make its decision and order of April 12, 1948, unconditional in form and effect on the ground that the Union had complied with all of those provisions of Section 9 of the National Labor Relations Act, as amended, which are not illegal or unconstitutional.

Thereafter on May 17, 1948, the Board issued an order (R. 62) denying the Union's request that the Board's decision and order of April 12, 1948, be rendered unconditional in form and effect. On June 10, 1948, the Union filed in the court below a petition to review the Board's orders of April 12, 1948 and May 17, 1948, in so far as their effectiveness was conditioned upon prior compliance by the Union with Section 9(h) (R. 65). The Company likewise petitioned to review and set aside the Board's order in so far as it imposed obligations upon the Company. Thereafter the court below ordered the cases consolidated (R. 77).

On September 23, 1948 the court below rendered a decision upholding the order of the Board in all respects (R. 82, 110). The court was unanimous in sustaining the order in so far as it directed the Company to bargain collectively with the Union with respect to its pension and retirement policies, to post notices, etc. As respects the provision of the Board's order conditioning its effectiveness upon compliance by the Union with Section 9(h) of the Act, Judges Kerner and Minton held that the statutory provision is constitutional, while Judge Major (who spoke for the court on the balance of the case), was of the view that Section 9(h) is unconstitutional.

The Union and the Company each petitioned for certiorari. The Union's petition was granted on January 17, 1949, and the Court has not acted upon the Company's petition. (See Jurisdiction, *supra*, pp. 1-2.)

SPECIFICATION OF ERRORS

The United States Court of Appeals for the Seventh Circuit erred:

1. In holding that Section 9(h) of the National Labor Relations Act is constitutional, and in failing to hold that that provision is unconstitutional.

2. In enforcing the provision of the order of the National Labor Relations Board conditioning its effectiveness upon compliance by the Union with Section 9(h) of the National Labor Relations Act.

3. In refusing to modify the Board's order by eliminating the provision conditioning its effectiveness upon compliance by the Union with Section 9(h).

ARGUMENT

Mr. Philip Murray, the President of the Congress of Industrial Organizations and of the United Steelworkers of America, and the other officers of both of those organizations, have refused to file the affidavits required by Section 9(h) of the National Labor Relations Act. They have refused because they consider Section 9(h) to be a grave infringement upon the civil liberties of unions, union officers, and union members. They are not communists nor do they have any sympathy for communism or any desire to retain communists as officers of CIO unions. They have refused to file because, as a matter of principle, they decline to yield to what they regard as a major invasion of the constitutional rights of labor to freedom of thought, speech and assembly, and of political activity.

Communism has no firmer foe than Mr. Philip Murray. The United Steelworkers of America, of which Mr. Murray is President, has no communist officers.* Not only are Mr. Mur-

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* Article III, Sec. 4 of the Constitution of the United Steelworkers of America, CIO, reads as follows:

> No member shall be eligible for nomination or election or appointment to, or to hold any office, or position, or to serve on any Committee in the International Union or a Local Union or to serve as a delegate therefrom who is a member, consistent supporter, or who actively participates in the activities of the Communist Party or of any Fascist, Totalitarian, or other subversive organization which opposes the democratic principles to which our Nation and our Union are dedicated.

ray and other influential leaders of the CIO effectively combating communist influences in unions, but the CIO has given strong support to the Marshall Plan and to ECA. Thus, the CIO's objection to Section 9(h) flows not from sympathy with communism, but from a devotion to civil rights and from a belief that unless the civil rights of communists are protected, those of others will not be.

This brief is addressed solely to the proposition that Section 9(h) of the National Labor Relations Act is unconstitutional because it deprives unions, union officers, and members of unions of freedom of thought, speech, and assembly, in violation of the First Amendment, and of freedom of political activity in violation of the Ninth and Tenth Amendments. There are, however, other substantial bases for challenging the constitutionality of Section 9(h), which are enumerated in this brief under "Questions Presented" *supra* (pp. 2-3), and which are fully covered in the appellants' briefs in *American Communications Association, CIO, et al.*, v. *Douds*, No. 336 this Term. For the sake of brevity we adopt what is said in those briefs on these issues, and do not argue them separately.

I.

Section 9(h) Heavily Penalizes Unions Which Have Officers With Proscribed Beliefs, in Order to Force Their Expulsion

The Taft-Hartley Act, the "Labor Management Relations Act, 1947" (Public Law 101, 80th Congress, 1st Sess., 61 Stat. 136, 29 U.S.C.A. Sec. 141 *et seq.*) became effective on August 27, 1947. It re-enacted and drastically amended the National Labor Relations Act. Among the provisions added to the old Act by the Taft-Hartley Act is Section 9(h), which reads as follows:

> (h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contem-

> poraneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports [sic] any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits.

The gist of this new Test Act is that union officers must foreswear certain proscribed political, or politico-economic, doctrines and associations. The beliefs and activities to be abjured are: (1) Membership in or affiliation with the Communist Party; (2) Belief in the overthrow of the government by force or by any illegal or unconstitutional methods; and (3) Membership in or support of any organization which believes in or teaches such overthrow. The required oath of disavowal will be referred to herein as the non-communist affidavit.

While compliance with Section 9(h) depends upon a union's officers, any one of whom can block compliance by refusing to execute the affidavit, the consequences of non-compliance fall directly only upon the union. These consequences are, in general, that the union loses certain rights under the Labor Relations Act, and is subjected to certain prohibitions—rights which are not taken from complying unions and prohibitions to which they are not made subject.

It is necessary to examine the precise character of the sanctions for non-compliance with Section 9(h) because of a peculiar argument made by the Board in support of the provision's validity. The Board asserts that the only consequence of non-compliance is that benefits otherwise conferred upon unions by the Act are withheld. The Board then goes on to argue that when Congress is dispensing favors, it raises no question under the First Amendment by conferring them upon some and denying them to others, but only a question under the due process clause of the reasonableness of the classification. This is so, the Board contends, even if the test for selecting or rejecting beneficiaries is their political or economic

beliefs. The Board then supports the validity of the statute under the due process test of reasonableness, asserting that it need not meet the clear and present danger test which is applicable to legislation restricting rights protected by the First Amendment.

Until it filed its brief in this Court in No. 336,[4] the Board had always conceded that the clear and present danger test could not be met with respect to Section 9(h), and had supported the validity of that provision solely by the argument summarized in the preceding paragraph. The Board now withdraws this concession, stating (footnote 35, pp. 52-53) that it never meant to make it and was merely misunderstood by lower court judges.[5] It still, however, devotes most of its brief, not to showing clear and present danger, but to arguing that it need not make such a showing and that Section 9(h) is sustainable under due process tests.

Even if Section 9(h) were enforced only by withholding benefits, the Board's argument that the use of a political test for selecting beneficiaries does not impair freedom of thought, speech and political activity would be wholly unsupportable under the decisions of this Court. That is fully demonstrated in the Appellants' brief in No. 336, at pp. 32-57, and will not be gone into in this brief.

What we shall seek to show in this portion of this brief is

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[4] References to the Board's brief are to be understood, unless otherwise stated, to be to its brief in No. 336.

[5] Judge Major, dissenting below in the present case, stated (R. 98):

> The Board in effect concedes that this section cannot be justified by what the Supreme Court has characterized as the "clear and present danger rule."

Similarly, Judge Rifkind, dissenting in No. 336, noted that "indeed, on the argument the defendant disavowed the presence of clear and present danger." 79 F. Supp. 565.

In its brief in the First Circuit in *W. W. Cross & Company, Inc. et al.* v. *N.L.R.B.*, the Board entombed its position on clear and present danger in footnote 50 and in the following verbiage:

> It is our view that although this legislation here under review was not predicated on the view that there existed a danger of violent overthrow of government warranting curbs on belief or expression of views, it does not follow that Congress did not believe that there existed a clear danger that the powers of the Act would be misused where labor unions were dominated by Communists.

that the Board's assertion that Section 9(h) is enforced only by withholding benefits is wholly misleading. We shall demonstrate, on the contrary, that the sanctions evoked by failure to file the affidavits impose upon a non-complying union penalties so heavy as to threaten its existence, leaving it no real alternative to expulsion of the officers whose beliefs offend 9(h). It follows that the statute must be judged as if it explicitly prohibited persons of the proscribed beliefs from serving as union officers.*

In order to determine whether the sanctions underlying Section 9(h) amount to virtual compulsion, as we contend, or only to an inconsequential loss of statutory benefits, as the Board suggests, or to something in between, it is, of course, necessary to examine the totality of the sanctions which may be invoked for non-compliance. The Board contends that only the particular sanctions involved in these particular cases before the Court (the present case and No. 336) can be considered. This argument is no doubt sound as regards any contention that a particular method of enforcement is in itself unconstitutional. But in weighing the Board's overall contention that no element of coercion is involved in the enforcement of 9(h), so that no question under the First Amendment is raised, it is obvious that the statutory sanctions must be considered in their entirety in order to ascertain just what degree or kind of compulsion they do create.

That the compulsion to comply with 9(h) may be less than absolute—that an alternative to compliance may be at least theoretically open to a union—does not alter the character of the constitutional rights which are invaded. Just such an il-

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*The Board makes no point of the fact that union officers' beliefs are ascertained by requiring them to file affidavits, rather than in some other way. None could be made: the exaction of a test oath, is, if anything, the very method of determining belief which is most offensive to civil rights, both because of its origin and frequent use as an instrument of tyranny and because of the element of self-incrimination. Cf. *Cummings* v. *Missouri*, 4 Wall. 277, and *Ex Parte Garland*, 4 Wall. 333.

As it passed both Houses, the bill did contemplate that the Board would determine whether union officers entertained the proscribed beliefs. It was changed in conference to avoid the administrative delay which that would have entailed. See 93 Cong. Rec. 6604. (References throughout to the Congressional Record are to the daily preliminary print.)

lusory alternative to compliance was urged in defense of the oath of allegiance required of children in *West Virginia* v. *Barnette*, 319 U. S. 624. It was argued there that parents could dispense with the government facility—that they had the option of sending their children to private schools, where the oath of allegiance would not be required. The majority of the Court passed this contention without comment, obviously viewing the expense of private schools as the equivalent of a direct sanction.[7]

A. *Section 9(h) Heavily Penalizes Non-Complying Unions*

1. Withholding of Remedies Against Employers—Section 9(h) directs the Board to withhold from non-complying unions the remedies otherwise available to them under the Act for the prevention and redress of unfair labor practices by employers.[8] As to non-complying unions, employers are once more free to use the repressive practices by which they broke unions and prevented organization in the days before the Wagner Act was passed.

Literally, Section 9(h) only prohibits the Board from acting upon charges filed by non-complying unions, leaving it free to consider charges by individual members of such unions. However, even the Wagner Act gave the Board complete discretion, not subject to judicial review, as to whether to act on charges.[9] By a Taft-Hartley amendment (Section 3(d)), that discretion was transferred from the Board to the General Counsel, whose dismissal of charges is now not reviewable even by the Board.

[7] The *Barnette* case also makes clear the irrelevance of *Hamilton* v. *Regents*, 293 U. S. 245, and *In Re Summers*, 325 U. S. 561, upon which the Board places considerable reliance. These cases involve the exclusion of conscientious objectors from a state university and from admission to a state bar. In the *Barnette* case, the court, speaking of the *Hamilton* case, said (p. 632):

> That case is also to be distinguished from the present one because, independently of college privileges or requirements, the State has power to raise militia and impose the duties of service therein upon its citizens.

[8] The language of Section 9(h) is that "no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of Section 10," unless the required affidavits are on file with the Board.

[9] *Marine Engineers' Beneficial Ass'n. Local No. 33* v. *N.L.R.B.* (C.C.A. 2, not reported below), certiorari denied 320 U.S. 777; *White* v. *N.L.R.B.*, 5 Labor Cases 62,742 (Ct. App. D.C. 1941) not officially reported. And see *Jacobsen* v. *N.L.R.B.*, 120 F. 2d 96, 100 (C.C.A. 3).

It is the General Counsel's normal practice to entertain harges filed by individuals alleging violations of Section (a)(3), and presumably 8(a)(1) and (4), but not those leging violations of 8(a)(2) and (5). However, even as to harges of the former types, the General Counsel, sometimes, the complainant's union is not in compliance, arbitrarily fuses to issue a complaint on the ground that the member acting for the union, even though it is the individual who is e primary victim of an unfair labor practice of this type. See e.g., *In re Times Square Stores Corp.*, 79 N.L.R.B. No. .)

Moreover, only the union can complain of an employer's fusal to bargain with it. Non-complying unions which have r years been the certified bargaining representatives in par- cular plants, are thus now deprived of all legal remedy gainst the employers' refusal to bargain with them. This fect of Section 9(h) is strikingly illustrated by the present se and by *United Steelworkers of America* v. *N.L.R.B.*, ow pending decision in the Court of Appeals for the First ircuit. In each of these cases the Union had for some years een the certified bargaining representative in the particular ant involved; the employer refused to bargain about certain bjects; the Union filed a charge with the Board; and, after a earing, the trial examiner issued a report recommending at the employer be ordered to bargain with the Union on the sues in question. Each case stood in this posture when the aft-Hartley Act was passed, and in each case the Board then onditioned its order upon compliance by the Union with the ew Section 9(h).

Employers are not forbidden to recognize or bargain with on-complying unions; but, if the employer refuses, the union as no legal remedy under the Act. The result is that the em- loyer, and not the government, decides whether the sanction f non-recognition is to be invoked against a non-complying nion. For the government to discriminate against unions on ccount of the political and economic beliefs of their officers is ad enough. For it to delegate such power to employers is orse.

Whether a particular employer will decide to withdraw

recognition from a non-complying union will depend on several considerations. One is whether he can effectively alienate the support of the union members and others in the community from the union on the ground that the union leaders hold proscribed beliefs. Attacks by employers upon unions and unionism for "patriotic" reasons are, of course, not a novel phenomenon in the field of labor relations. The recent longshoremen's strike on the west coast took place because the employers were induced by 9(h) to believe that they could successfully refuse to deal with the existing leadership of the union. See *Fortune*, January 1949, p. 153. A second factor which will enter into the employer's consideration is whether the economic strength of the union is so great as to make it impracticable for him to withdraw recognition. For while a union has no legal remedy, it still, in some circumstances, has the right to strike or invoke other economic sanctions not prohibited by the Taft-Hartley Act.

Yet a third factor which may induce an employer to withdraw recognition from a non-complying union is the presence in the field of a competing union which is more acceptable to the employer. As explained below, the Board conducts its representation elections in such a fashion as virtually to insure the victory of a complying union. Thus, an employer can indirectly use non-compliance with Section 9(h) to influence its employees to reject a non-complying union and select its competitor. That, of course, is just what an employer is forbidden by Section 8(a)(2) to do directly.

2. *Outlawing of Union Shop.*—The consequences of non-compliance with 9(h) go far beyond the loss of legal remedies under the Act. Unions which are not in compliance with Section 9(h) are prohibited from entering into a union shop contract with an employer. That is effected in this way: the Act, by Sections 7, 8(a)(3), and 8(b)(1), prohibits the closed shop and permits the union shop only after the union has won a special type of election provided for in Section 9(e)(1) of the Act. And Section 9(h) provides that no such election shall be conducted at the behest of a non-complying union.

Not only the union shop, but the closed shop, was legal long before the Wagner Act. Indeed, this provision puts non-

complying unions under a restraint to which unions were never before subjected by federal legislation. A closed or union shop is the goal of every union. To prohibit the union shop to non-complying unions, while permitting it to complying unions, is to strike the former a deadly blow.

3. *Non-Complying Unions Excluded from Board Elections.*—The exclusion of non-complying unions from participation in Board elections, and the holding of these elections under rules which virtually insure the success of competing complying unions, are discussed in Appellants' brief in No. 336, at pp. 13-17. Here we wish to add only the most recent example of how the Board goes about permitting employees to designate bargaining "representatives of their own choosing" (Section 7).

In the proceeding referred to (*In re Woodmark Industries, Inc.*, 80 N.L.R.B., No. 171) the Board certified a complying union which received only 15 votes out of a total of 43 cast. Of the remaining votes, 11 were for no union and 17 were write-ins for a non-complying union which had theretofore been the bargaining representative. The Board voided the 17 write-in votes and certified the complying union, which was the only union on the official ballot, on the ground that it won a majority of the 26 valid ballots cast.

The write-in votes were not even given the status of votes against the complying union. If they were, the Board declared, the non-complying union would reap "an indirect benefit • • • [from a Board election] as the result of having demonstrated its strength in such election and having secured the defeat of a complying labor organization properly participating therein."

This "election" strikingly resembles those held in the "Peoples' Democracies" of eastern Europe. Joyfully accepting the mandate of the 80th Congress to stamp out political unorthodoxy in unions, the Board reduces to a mockery the constitutional rights of workers to form and join labor organizations of their own choosing.[10]

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[10] A more euphemistic description of what happens in these Labor Board elections is that of the congressional Joint Committee on Labor-Management Relations, in its Report issued December 31, 1948 (p. 35):

> • • • unions whose officers have complied had marked success in NLRB representation elections whereby they have supplanted the noncomplying union.

Theoretically, it is open to a non-complying union, faced with such an election, to persuade the employees to reject its complying competitor by voting for no union, and then, by using its economic strength, to induce the employer to bargain with it. Practically, such a course is most difficult. In an election in which the ballot offers only the choice between the complying union and no union, the employees usually will choose the complying union, rather than vote for no union at all, even though they would choose the non-complying union if they were given that choice. The choice between a complying union and no union is not a free choice, if what the employees want is to be represented by a non-complying union.

This is not a withholding of statutory benefits: it is a direct interference with the constitutional right of self-organization. See *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33-34; *Thomas* v. *Collins*, 323 U. S. 516, 539. Such interference is not limited to the holding of rigged elections. It is implemented also, in the statutory provisions to which we next come, by penalizing non-complying unions and protecting complying unions.

It may be said, and with accuracy, that nothing in the Act requires the Board to go to such lengths in discriminating against non-complying unions. In fact, all that the Act specifically requires with respect to representation proceedings is that they not be entertained upon the application of a non-complying union. As far as the language of the Act goes, it would be open to the Board to place non-complying unions on the ballot, or to conduct elections upon the applications of members of non-complying unions.

However, if the Act does not require the Board to engage in its crusade against non-complying unions, it at least leaves it open to the Board to do so. And the congressional Joint Committee on Labor-Management Relations, which has had the Board's operations in this respect under continuous survey (see *infra* pp. 20-22), has, needless to say, uttered no word of criticism of the Board's zeal in enforcing not merely the literal language of 9(h) but the policy underlying it.

In a statute involving restraint upon freedom of speech,

indefiniteness as to how far the officials administering it may go in applying it is particularly vicious. That was pointed out by this Court in *Thomas* v. *Collins*, 323 U. S. 513, 536-537. One reason the statute there involved was stricken down was that a union organizer could not know, with that statute on the books, in what kind of conduct, or even abstract advocacy, he could safely engage. See also *Winters* v. *New York*, 333 U. S. 507, 509-510.

4. *Certain Strikes or Boycotts by Non-Complying Unions Prohibited*—In three types of situations the Act makes illegal and creates novel and drastic sanctions against strikes or boycotts by non-complying unions while permitting them by complying unions. These provisions operate not only for the protection of employers but of complying unions which have won "elections" of the sort just described.

Section 8(b)(4)(B) makes it an unfair labor practice for a union to engage in a strike or boycott against one employer for the purpose of requiring another employer to recognize a union, unless that union has been certified as the bargaining representative under the Act. Since a non-complying union cannot be certified, the effect of Section 8(b)(4)(B) is to deny to every non-complying union the aid, by strike or boycott, of other labor organizations, in seeking bargaining rights. Prior to the enactment of Section 9(h), and prior to the Wagner Act as well, labor organizations supported each other in striving for recognition. Now the Act denies such support to non-complying unions, while permitting it to complying certified unions.

Section 8(b)(4)(C) makes it an unfair practice for a union to strike to compel recognition if another union has been certified. This provision, obviously, is for the protection of complying unions which have won "elections" in which competing non-complying unions have been excluded from the ballot. The non-complying union, having been barred from the election, is also denied the use of its economic weapon—a strike. And the complying union, having had the benefit of a one-ticket election, is given an additional protection which it would not need if it were actually the free choice of the employees. Here, again, non-complying unions are prohibited

from engaging in conduct which was legal before Taft-Hartley.

Section 8(b)(4)(D) prohibits a union from striking to secure the assignment of particular work to its members, unless it has been certified as the representative for employees performing such work. Once again, activities which were legal in the absence of statute, and which continue to be legal for certified complying unions, are outlawed when undertaken by organizations which have not complied with Section 9(h).

The summary injunction procedure created by Section 10(1) of the Act may be invoked against strikes or boycotts prohibited by Section 8 (b)(4)(B) and (C); and such strikes and boycotts, and those prohibited by 8(b)(4)(D) as well, are also declared to be illegal for the purpose of suits for damages by employers.[11]

The cumulative effect of all of these provisions upon a non-complying union is obviously very great. As stated by Judge Prettyman, dissenting, in *N.M.U.* v. *Herzog*, 78 F. Supp, 146, 179 (D.C., D.C., 1948), it may be doubted whether a non-complying union can permanently survive. At the least, unions are placed under exceedingly strong compulsion to comply with Section 9(h), and to expel union officers who cannot or will not sign the required affidavit. That was precisely the purpose of Congress in enacting 9(h).

B. *The Purpose of Congress Was to Force Unions to Expel Officers Having the Proscribed Beliefs*

1. *Legislative History*—Section 9(h) was enacted specifically "to prevent Communists from being officers of labor unions." (Senator Ball, 93 Cong. Rec. A3233). Congress did not conceal its purpose: numerous assertions during Congressional debate like that just quoted are assembled in Appellants' brief, in No. 336, at pp. 41-44. Further demonstration of the point seems unnecessary, and the following discussion seeks only to clarify the general outline of the legislative history.

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[11] Section 303(a) repeats the prohibitions of Section 8(b)(4); and Section 303(b) provides that anyone injured by any violation of (a) may sue in any federal district court and recover the damages sustained.

Section 9(h) originated as Section 9(f)(6) of the House bill. As reported out by the House Committee, it contained no requirement for filing affidavits, but provided that the Board shall not certify a union any of whose officers is a member of the Communist Party, etc.[19] The House bill also contained a provision, which was Section 8(c)(6), prohibiting unions from expelling members except upon certain specified grounds, one of which, subsection (D), was being a member of the Communist Party, etc.

Referring to these two provisions, the House Committee Report (No. 245, 80th Cong., 1st Sess., pp. 38-39) stated:

> *Section 9(f)(6).*—At least 11 great national unions and a large number of local unions seem to have fallen into the hands of Communists, although in every case Communists appear to compose only a very small minority of the membership. In most of these cases the rank and file object to communistic influence in their unions. By the bill of rights set forth in section 8(c), the bill helps them to rid themselves of communistic control. Section 9(f)(6) makes it incumbent upon union leaders who now tolerate Communist infiltration in their organizations, affiliates, and locals, and temporize with it, to clear house or risk loss of rights under the new act.
>
> • • • Communists use their influence in unions not to benefit workers, but to promote dissension and turmoil. They should be weeded out of the labor movement.

It was presumably because of the presence of Section 8(c)(6)(D) in the House bill that it was several times asserted during the House debates (see Appellants' brief, in No. 336, at pp. 41-42) that the bill would "drive Communists out of our labor organizations" (Congressman Hartley, 93 Cong. Rec. 3705), and not merely that the bill would drive out labor officers

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[19] Section 9(f)(6) was amended in the House to apply to any officer who "is or ever has been" a member of the Communist Party, etc., the amendment being adopted by a vote of 153 to 10. It was later dropped in conference:

> The "ever has been" test that was included in the House Bill is omitted from the conference agreement as unnecessary, since the Supreme Court has held that if an individual has been proved to be a member of the Communist Party at some time in the past, the presumption is that he is still a member in the absence of proof to the contrary. [Report No. 510, 80th Cong., 1st Sess., p. 49.]

who were Communists.[13] Section 8(c) (6) was, however, dropped in conference, its place being taken by a provision in Section 8(a) (3) that even under a union shop contract an employer shall not discharge an employee who is expelled from a union for any reason other than non-payment of dues. The subsequent discussion concerning what had become Section 9(h) (see Appellants' brief, in No. 336, at pp. 42-44) was, hence, more sharply focused, both in the Senate and in the House, and was explicit that it was "The provision to keep communists out of leadership of unions * * *." (Representative Engel, 93 Cong. Rec. A2803.)

2. *Joint Committee Report*—Title IV of the Taft-Hartley Act created a Joint Committee on Labor-Management Relations, for the purpose of studying labor-management relations, including the operation of the Act. This Committee has found that Section 9(h) has been quite effective in achieving its purpose of forcing unions to remove communistic officers. Its report dated March 15, 1948, stated (Senate Report No. 986, 80th Cong., 2nd Sess., pp. 10-11):

> Officers of a large majority of labor organizations have complied with the filing requirements. In many instances, unions have taken decisive action to compel reluctant officers to comply with the filing requirements. Recent newspaper accounts report action by the International Ladies Garment Workers Union (AFL), the United Furniture Workers (CIO), and the United Shoe Workers (CIO), to cleanse their organizations of officers who are not willing, or are not able, to file the necessary affidavits.
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> * * *
>
> A few large labor organizations, such as the United Electrical Workers of America (CIO), the United Steelwork-

[13] An additional statement to the latter effect is that of Representative Bell (93 Cong. Rec. 3704):

> Mr. Chairman, this is a correcting amendment to paragraph 6 on page 33 which provides that any person who is a Communist or belongs to certain Communist organizations shall not be an officer in a union. I am in thorough accord with the purpose of that paragraph which is to protect the future of this country against the impending danger of having communists in control of our great American labor organizations.

This bill was regularly spoken of as barring or excluding Communists from serving as officers of unions. See e.g. statements of Representative Mundt, 93 Cong. Rec. 3706-7; Representative Crawford, 93 Cong. Rec. 3706.

ers of America (CIO), and the United Mine Workers of America, independent, have announced it as their policy that they would not comply with the filing requirements of the act. Some evidence of membership dissatisfaction with the policy of boycotting the processes of the National Labor Relations Board has been noted. For example, a New York local of the United Electrical Workers, Local 1237, is reported to have withdrawn and formed an independent mechanical and electrical workers' union in order that it might have the protection afforded by the new act. Also, in St. Louis, a large segment of the Retail, Wholesale and Department Store Employees Union (CIO), seceded from that union to form a new independent union and took quick steps to comply with the act. In Pittsburgh, the State liquor store employees broke away from the United Public Workers (CIO) to form an unaffiliated union. Other unions which have not yet complied are bringing themselves within the protection of the act. Recently the CIO's union of Marine and Shipbuilding Workers, with an estimated membership of more than 100,000, voted to comply with the affidavit and registration requirements.

The committee hopes that within the very near future all labor organizations in the United States will be persuaded of the benefits which the procedures under the Taft-Hartley Act hold out for them and will take the necessary steps to avail themselves of the benefits and peaceful procedures offered by the law.

The Joint Committee's final report, issued December 31, 1948, likewise states (p. 3):

Elimination of Communist partisans and adherents from official posts and positions of responsibility in both national and local unions is one of the most pronounced and significant effects of the Labor Management Relations Act, 1947. There are still unions, in a steadily declining number, however, whose officials have not filed non-Communist affidavits in compliance with the law. A number of unions have fully met this provision with the ouster of officials who have failed to meet this statutory requirement.

Again (p. 35):

In many instances, unions have taken decisive action to compel reluctant officers to comply with the filing requirements. Refusal by incumbent officers to make the

affidavit has been an issue in a number of union elections which resulted in such officers being denied reelection.

II

By Penalizing Unions for Having Officers With Proscribed Beliefs, Section 9(h) Impairs Basic Civil Rights Protected by the Constitution

Freedom of political thought and action separates democracy from despotism, or, to use a term currently more popular, totalitarianism. Any system of free government must recognize the right of people to determine for themselves what they believe in—and to act on their beliefs. If political freedom is to be preserved in this country, these rights must be zealously safeguarded. Fear of a foreign police state must not be the excuse for degenerating into one here. It is not enough to hate communism, as did the Congressmen who enacted Section 9(h). We must love democracy as well, understanding that its essence is the right of the people freely to choose among competing political and economic beliefs.

The question before the Court is the constitutionality of a statute which is designed to force unions to remove officers who do not foreswear certain proscribed political and economic beliefs, and which subjects unions to various onerous penalties unless they do remove such officers. Such a statute, we submit, infringes the most fundamental civil rights of unions, union members, and union officers; and can be sustained only if the criteria for testing the validity of legislation invading freedoms normally protected by the First Amendment are met.

A. *Section 9(h) Restricts Unions and Members of Unions in Their Exercise of Freedom of Thought, Speech and Assembly, and of Political Activity*

Under the political systems which have developed in the democratic countries, effective action in the political field means group action—action through political parties, labor unions, and other associations.[11] The right to create, to solicit

[11] The unique contributions of voluntary associations, other than political parties, to the formation and strengthening of democratic processes and institutions in the United States has been the subject of fre-

others to join, and to act through such organizations is protected by the Bill of Rights. It is the form which the freedom of assembly of earlier times takes in a more populous country and a more complicated society. Such groups often afford the only effective vehicle for the exercise of free speech.

> It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, * * * and therefore are united in the First Article's assurance. [*Thomas* v. *Collins*, 323 U.S. 516, 530].

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quent comment. On the significance of groups in American life, see Schlesinger, *The Rise of the City—1878-1898* (1933), pp. 409-410; Bryce, *The American Commonwealth* (1910), p. 294; de Tocqueville, *Democracy in America* (1900), pp. 114-118. On the vital role played by voluntary groups in the founding of the American republic, see Van Tyne, *The Causes of the War of Independence* (1922), pp. 373, 374-376, 427-428 (Committees of Correspondence).

On the contributions of groups and voluntary associations in particular fields, see

Race Relations:

Hobbs, *The Antislavery Impulse* (1933); McMaster, *History of the People of the United States* (1895), Vol. II, p. 21; Myrdal, *An American Dilemma* (1944), Vol. II, pp. 810-857;

Peace Movements:

Curti, *American Peace Crusade* (1929); Schlesinger, *The Rise of the City* (1933), pp. 365-366;

Economic Relations:

Hinds, *American Communities and Cooperative Colonies* (1908); Noyes, *History of American Socialisms* (1870); Adams, ed., *History of Cooperation in the United States*, Vol. VI, Johns Hopkins Studies in Historical and Political Science (1888);

Women's Rights:

Schlesinger, *New Viewpoints in American History* (1926), pp. 126-160;

Public Schools and Adult Education:

Curti, *The Growth of American Thought* (1943), pp. 349-352, 596-597; Post, *Popular Free Thought in America* (1943), p. 87;

Land Reform and Colonization:

Zahler, *Eastern Workingmen and National Land Policy* (1941); McMaster, *op. cit.*, Vol. VI, p. 109;

Agricultural Associations:

Oberholtzer, *A History of the United States Since the Civil War* (1926), Vol. III, pp. 102-109; Hicks, *The Populist Revolt* (1931);

Humanitarian and Related Movements:

Fish, *Rise of the Common Man* (1927), pp. 259-260; Stewart, *The National Civil Service Reform League* (1929); Nevins, *The Emergence of Modern America* (1927), p. 334; McCrea, *The Humane Movement* (1910).

With the increased participation of government in our economic life, workers are forced to go into politics, through their unions, in order to preserve their economic security and standard of living. Just as individual workingmen must act in concert if they are to further their economic interests, so they must express their political views through the spokesmen for their group if they are to exercise their political freedom effectively.[15] If an individual is helpless in dealing with his employer, then how can it be said that he is more able to deal with the powerful employer-dominated political interests which, unless restrained, can decisively fix or alter the terms and conditions under which he must live? In sheer self-protection he must associate with others in order to preserve those political values which enforce and promote his economic interests. He must organize politically in order to defend against political attack the gains achieved through his economic strength. He must organize politically in order to meet the organized political attack of other interests in our national life.

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[15] The best available account of the forces which have stimulated labor's political activities is Taft, *Labor's Changing Political Line*, 43 Journal of Pol. Ec. 634 (1937).

The following texts document the historic role of labor in American political life:

Beard, *The American Labor Movement, A Short History* (1935), pp. 33-46, 54-61, 80-85, 103-112, 165-171; Bimba, *The History of the American Working Class* (1927), pp. 84-89, 204-208, 323-330; Carroll, *Labor and Politics* (1923), pp. 27-54, 80-138; Childs, *Labor and Capital in National Politics* (1930); Commons and Associates, *History of Labor in the United States*, Vols. I and II (1918), Vol. I, pp. 169-335, 369, 454-471, 522, 535, 548-559; Vol. II, pp. 85-109, 124-130, 138-146, 153-155, 168-171, 240-251, 324, 341-342, 351-353, 461-470, 488-493; Daugherty, *Labor Problems in American Industry* (1933), pp. 622-629; Foner, *Labor Movement in the United States* (1947), pp. 104-105, 130-134, 140, 149-166, 210-217, 245-248, 262-263, 334-336, 357-359, 372-373, 423-429, 475; Gaer, *The First Round* (1944), p. 49; Harris, *American Labor* (1938), pp. 33-55, 65-69; Hoxie, *Trade Unionism in the United States* (1917), pp. 78-102; Lorwin, *The American Federation of Labor* (1933), pp. 88-93, 123-126, 221-226; 351, 397-425; Millis and Montgomery, *Organized Labor* (1945), pp. 7, 10, 27, 29-31, 34, 42n, 51, 52n, 54-55, 57n, 62, 67, 71, 81, 91, 108-111, 118, 123-129, 141, 143, 149, 178, 181-188, 232-238, 303-305, 311, 313, 317-320, 348-349, 600, 669, 829, 890; Perlman, *A History of Trade Unionism in the United States* (1929), pp. 146-160, 285-294; Perlman and Taft, *History of Labor in the United States, 1896-1932* (1935), pp. 150-166, 525-537; Schlesinger, *The Age of Jackson* (1945), pp. 132-158, 180-185; Walsh, *C. I. O., Industrial Unionism in Action* (1937), pp. 248-271; Ware, *The Labor Movement in the United States, 1860-1895* (1929), pp. 350-370; Ware, *The Industrial Worker, 1840-1860* (1924), pp. 154-162.

And he must organize politically in order to safeguard and promote his right to form and join unions and his right to bargain collectively and to strike."

Leaders of modern labor organizations are necessarily participants in the political life of their local community, of their state, and of the nation. They express the political views of their organizations. They consult with and are consulted by other organizations and individuals. They lend support to joint projects and they ally themselves with others to induce the passage of legislation and to achieve other political goals. They participate in political planning and election campaigns. They take part in government administration and in the shaping of government policy, as in the case of the tripartite National War Labor Board and National Wage Stabilization Board, in which labor leaders represented the labor point of view. And they exert an influence in political affairs commensurate with the size of the labor organizations which they head.

Members of labor organizations, aware of the important role of their union in political life, are influenced in their choice of union officers by the political views and beliefs of the candidates. For workers, freedom of thought, speech and assembly and of political activity means freedom of work in unions and through leadership of their own choosing. As established by *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33-34—

> That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents.

Section 9(h) penal ·s unions, and through them their members, for selecting as officers persons having the political beliefs which Section 9(h) proscribes. To tell union members that they cannot have as officers persons of a particular political persuasion restricts their freedom of political activity through the very instrumentality—the union—which is peculi-

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[16] One of the most powerful factors which brought labor into political life was the evil of "Government by Injunction." Lorwin, *The American Federation of Labor* (1933), pp. 88, 90.

arly adapted to serving as a vehicle for worker expression, both in the political and, if they can be separated, economic fields.

A more direct interference with the freedom of union members—freedom of speech, of assembly, and to engage in political activity, is hard to imagine. Let us take, for example, the case of a union, the majority of whose membership is communist. Section 9(h) prohibits these workers, on pain of onerous penalties to their union, from selecting as their officers persons adhering to the same political party as themselves. Union members are entitled to choose officers whose political beliefs are acceptable to them—not to the Congress. That right cannot be taken away without raising the gravest constitutional issues.

B. *Section 9(h) Restricts Union Officers in Their Exercise of Freedom of Thought, Speech and Assembly, and of Political Activity*

The plain purpose and effect of Section 9(h) is to prevent persons of designated political and economic views from serving as union officers. Thus the statute strikes directly at the freedom of belief, speech, and political activity of union officers. And persons who have exercised these constitutionally protected freedoms in a fashion inacceptable to Congress are, in consequence of their unorthodoxy, denied yet another right essential to the expression and effectuation of their beliefs—the right, if the membership agrees, to be an officer of a labor union. Thus they are excluded from the very positions in which they might give effective expression to their views—and that, of course, is why they are excluded.

In view of this gross infringement of the civil rights of union officers, it is with a feeling of apology that we point out that they also lose their jobs. This consequence of Section 9(h) is, however, particularly relevant to the Board's argument that the only sanction of Section 9(h) is to withhold from unions benefits otherwise made available under the statute. As to unions this argument is factually misleading and legally irrelevant: as to union officers it is preposterous. They are not denied a benefit: their unions are put under pressure to fire them. Cf. *Truax* v. *Raich*, 239 U. S. 33.

III

Civil Rights May Be Limited Only When Their Exercise Creates Clear and Present Danger to a Paramount Public Interest

In the language used by Mr. Justice Holmes in first enunciating the now famous test, freedom of speech can be restricted only if "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils the Congress has a right to prevent." *Schenck* v. *United States*, 249 U. S. 47, 52. He spoke in 1919, at the outset of the red scare which followed the first World War. As national hysteria thereafter mounted, the Court, notwithstanding strong dissents by Justice Holmes and Justice Brandeis, seems to have wavered in its adherence to the clear and present danger test. *Schaefer* v. *United States*, 251 U. S. 466; *Gitlow* v. *New York*, 268 U. S. 652.

In more recent years, however, the Court has returned to that test, and has stressed with ever increasing firmness the strong showing of necessity which must be made to uphold legislation which restricts freedom of belief or thought or speech. Thus in *Bridges* v. *California*, 314 U. S. 252, it said (p. 263):

> What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.

And still more recently, in *Thomas* v. *Collins*, 323 U. S. 516, 530:

> Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.

In the *Thomas* case, incidentally, the Court rejected an argument very similar to that by which the Board here seeks to avoid the clear and present danger test. In that case the Court had before it a Texas statute which required organizers to secure an identification card from a state board before soliciting persons to join unions. The state, like the Board here, sought to avoid the clear and present danger test by urging

that the statute did not restrict free speech but regulated business practices, so that the test of its constitutionality was only whether it had a reasonable basis. This Court rejected the state's contention, and held that the clear and present danger test applied, stating (p. 530):

> * * * It is the character of the right, not of the limitation, which determines what standard governs the choice.

The Court then went on to hold the statute unconstitutional.

Now, as after the first World War, the country is in a period of anti-red hysteria. In a mood far from dispassionate, and with scarcely a voice raised on behalf of ancient freedoms, the 80th Congress enacted Section 9(h)—avowedly for the purpose of driving out union leaders whose beliefs are too radical to be acceptable to Congress.

Surely so gross an invasion of fundamental civil rights is to be sustained only upon the clearest showing of necessity. That is not to say that the Congress is powerless to protect the country against real dangers. Even the gravest invasions of civil rights have been sustained, as in the Japanese removal cases, when thought necessary to protect the nation against imminent peril. But the danger must be real and the restriction on freedom necessary.

The Board's main reliance in this connection seems to be upon cases dealing with government employees, i.e., *United Public Workers* v. *Mitchell*, 330 U. S. 75; *Oklahoma* v. *Civil Service Commission*, 330 U. S. 127; and *Friedman* v. *Schwellenbach*, 159 F. 2d 22 (Ct. App. D. C.), certiorari denied 330 U. S. 838. The first two of these cases sustained, by a vote of 4-3, provisions of the Hatch Act restricting the political activity of government employees. The third case involved the discharge of an employee by the executive branch of the federal government under its so-called loyalty program.

The Hatch Act cases are wholly inapposite here. In the first place, government employees, according to the four majority justices, occupy a special relation with respect to the government, which permits the latter to regulate their political activities within reasonable limits. It can hardly be thought that union officials owe, or can have imposed upon

them, any similar duty to be politically neutral." In the second place, the Hatch Act regulates only political activities, while Section 9(h) deals with thought and beliefs as well. It was on the basis of precisely this distinction that the Hatch Act was upheld:

> Appellants urge that federal employees are protected by the Bill of Rights and that Congress may not "enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employees shall attend Mass or take any active part in missionary work." None would deny such limitations on Congressional power but because there are some limitations it does not follow that prohibition against acting as ward leader or worker at the polls is invalid. [*United Public Workers* v. *Mitchell*, 330 U. S. 75, 100.]

As regards the *Friedman* case, it has never been held that judicial review is available to employees discharged by the executive branch of the government. Political tests have been used since the earliest times in this country in the hiring and firing of government employees, and while the spoils system has been somewhat modified in favor of a civil service, the more important government jobs are still filled largely upon the basis of party loyalty. Therefore the discharge of an employee by the executive branch raises neither a constitutional question nor a justiciable issue, at least according to the notions accepted up until now. The so-called loyalty program obviously proceeds upon this assumption, since it makes no pretense of according to government employees even the rudiments of either substantive or procedural due process. See Emerson and Helfeld, *Loyalty Among Government Employees*, 58 Yale L. Journal 1 (1948) Thus, the "loyalty" program can hardly be regarded as a precedent for determining the civil rights of persons who have not placed themselves in the special category of government employees. If it be so regarded, the Bill of Rights is as dead as the constitution of the Confederacy.

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[11] In *Ex parte Garland*, 4 Wall 333, 378, the Court said:

> The profession of an attorney and counsellor is not like an office created by an act of Congress, which depends for its continuance, its powers, and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution. Attorneys and counsellors are not officers of the United States * * *.

IV

Section 9(h) Cannot Be Sustained Under the Clear and Present Danger Test

These are times of international strain acerbated by the coincidence of national and ideological rivalries. If the activities of the Communist Party constitute a clear and present danger to the continued existence of the American constitutional system, threatening to overturn it by force or violence, or by treasonable adherence to a foreign power in time of war, the Communist Party can constitutionally be outlawed.

Thus far, however, the judgment both of the country and of the Congress has been that so extreme a step is not warranted. Even the reactionary 80th Congress failed, after long consideration, to pass the Mundt-Nixon bill, and that bill would have stopped considerably short of outlawing the Communist Party. And even in the heat of the political campaigning last summer, the candidates of both major parties agreed that no such extreme step as outlawing the Communist Party should be taken.

The statute now under consideration, is, of course, narrower. It does not outlaw the Communist Party but seeks only to exclude members of that party and others entertaining certain described beliefs from serving as officers of labor unions. But that does not eliminate the need for careful and dispassionate scrutiny of the circumstances which were thought to justify the legislation.

Accordingly, we turn to consideration of the factual material which the Board offers as justifying Section 9(h). This is, incidentally, substantially the same material which was proffered by the Board in the various lower courts, not as showing clear and present danger but as establishing reasonableness of discrimination in singling out beneficiaries for government favors.[11]

The legislative history of the Taft-Hartley Act shows that if it can be said that Congress was aiming at any specific supposed evil in enacting 9(h), that evil was political strikes.

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[11] The Board's assertion that it did not concede in the lower courts that it could not meet the clear and present danger test seems to be wholly unjustified. See *supra*, p. 10.

Union officers who are communists, might, Congress—or at least some members of the House—thought, cause political strikes.

This conclusion appears to have been based exclusively upon the testimony of Mr. Louis Budenz, a well-known former Communist, who testified before the House Committee which was considering the Taft-Hartley Act. He stated that a strike which occurred at the Allis-Chalmers plant, in Milwaukee, early in 1941, was precipitated by communist officers of the local, not to improve the economic position of the union, but on the instructions of the leaders of the American Communist Party, in order to hinder aid to Britain. And Budenz testified similarly with respect to a strike at the North American Aviation Company during the same period.

That was the only testimony specifically dealing with political strikes which was before the Congressional committee which considered the Taft-Hartley Act.[9] Two strikes, six years before. These strikes, moreover, took place before the United States had entered the war—not during the war, as the Board would lead the Court to believe by misquoting the committee hearings.[10]

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[9] In outlining the bill to the House, Congressman Hartley's explanation with respect to Section 9(f)(6)—the predecessor of 9(h)—was as follows (93 Cong. Rec. 3533):

> It prohibits certification by the Board of labor organizations having Communist or subversive officers. If anyone doubts the need of that in the bill all you have to do is to read the testimony taken by our subcommittee in connection with the Allis-Chalmers strike in Milwaukee and you will understand that section of the bill is most in order.

Representative Kersten in supporting Section 9(f) (6) on the floor of the House, also used the Allis-Chalmers strike as his only specific justification for the provision. He rehashed Budenz' testimony at considerable length. 93 Cong. Rec. 3577-8.

[10] The Board (Brief, p. 27) quotes Harold W. Story, Vice-President of the Allis-Chalmers plant, as testifying that the strike, lasting 76 days, held up for that period delivery of power plants "to a plant that the government wanted to build to make powder during the wartime."

Actually the testimony was clear that the strike was called during the Spring of 1941, and that it lasted for 76 days. (Hearings before the House Committee on Education and Labor on Bills to Amend the National Labor Relations Act, 80th Cong., 1st Sess., p. 1384.) And the misleading language quoted by the Board was not that of Story, but of Congressman Clare Hoffman, a notorious labor baiter:

> MR. HOFFMAN: And that strike held up your delivery of that

At that time opposition to aid to Britain was, if shortsighted, entirely legal. Such opposition was not confined to communist labor leaders—it was likewise engaged in by Representatives, Senators, and even some industrialists. It will surely be remembered that a large middle western automobile manufacturer refused an order from Britain for airplane engines, because, it was rumored, of his political viewpoint. Yet that, if true, would hardly be thought to render constitutional a statute designed to exclude Republicans or isolationists from operating industrial plants.

In addition to this specific testimony about two strikes which were assertedly called for political reasons, the hearings on the Taft-Hartley Act and the debates, particularly in the House of Representatives, were replete with vague but violent denunciations of communists, subversives, fellow travelers, party-liners, front organizations, etc., etc. These denunciations had no particular relation to Section 9(h) or its predecessor, and were sprinkled throughout the discussion of the entire Act. The House debates are also marked by vitriolic hostility to unions.[21] A reading of this legislative history suggests that Congress was really motivated by general hostility to labor unions and to communism, and in enacting Section 9(h) sought to strike at their point of supposed conjunction. Political strikes occupied no very important place in the House discussion and were not so much as mentioned in the Senate. The Board's argument that Section 9(h) was enacted to meet the danger of such strikes is thus to some extent an improvisation, devised after the enactment of the statute in the subsequent attempt to justify it.

General denunciations of communism by prominent men are easy to find. We do not disagree with them. But they are not a basis for holding that the national security, or industrial peace, are gravely threatened by communist union officers. As stated in *Bridges* v. *California*, 314 U. S. 252, 263:

> * * * even the expression of "legislative preferences or beliefs" cannot transform minor matters of public in-

machinery to a plant that the Government wanted to build to make powder during the wartime, for 76 days?

MR. STORY: That is correct. [Hearings, p. 1385.]

[21] See, for example, the statements by Representatives Smith (93 Cong. Rec. 3473-4), Hoffman (*id.* 3538), Crawford (*id.* 3706).

convenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression.

In addition to the Budenz testimony which was before Congress, the Board relies upon material culled from such diverse sources as reports of the House Committee on Un-American Activities [*] and biographies and other writings of labor leaders. From these last the Board has quoted criticisms of the conduct of communist union officers in calling, or deciding not to call, strikes for reasons other than achievement of immediate trade union objectives. Several of these examples are of communist union leaders who assertedly refused to call strikes during the war, because, although it would have been advantageous to do so from a strictly trade union standpoint, it would have interfered with war production to the detriment of our then ally, Russia.

The Board has also quoted general statements by Congressmen and others to the effect that communist officers of unions have political, as well as economic objectives. That is, of course, equally true of union leaders who are Democrats or Republicans.[**]

These various materials, as the Board always recognized until it got to this Court, fall far short of the showing necessary to sustain a grave invasion of freedom of speech, thought,

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[*] The Board states (Br., pp. 32-33) that a "new pamphlet," entitled "100 Things You Should Know About Communism and Labor" (Govt. Print. Office, 1948), has been issued by the Un-American Activities Committee based upon its "extensive hearings." And the Board quotes the pamphlet as listing some twenty unions which have "Communist leadership strongly entrenched."

Actually the portion of the new pamphlet quoted by the Board only purports to be quoting some unidentified 1944 statement by the same Committee that at that time the listed unions had "Communist leadership * * * strongly entrenched." The stars, indicating some omission in the Committee's 1948 quotation of its 1944 statement, were not included by the Board in quoting the pamphlet, and we have no idea what was omitted.

Thus the congressional Committee, noted for its irresponsible character, was pulling itself up by its own bootstraps, and the Board is asking this Court to uphold a grave invasion of civil liberties upon the basis of its misquotation of this sort of material.

[**] In this Court the Board also, for the first time, relies upon the experience of other countries with communist controlled labor unions (Br. 45-48). That is, of course, beside the point. The question is clear and present danger here.

and political activity. The most that they show, or tend to show, is that communist labor leaders have sometimes called strikes—or decided not to call them—in aid of objectives of the Communist Party other than advancement of the immediate economic interests of the union. And that is all that the materials do show.

They do not show, and Congress did not find (1) that political strikes are a clear and present danger to the security of the nation, or (2) that political strikes threaten widespread, or even substantial, industrial unrest. Absent such a showing, there is no basis for sustaining, under the clear and present danger rule, the heavy restraints laid by Section 9(h) upon traditionally protected freedoms.

There is, regrettably, no indication that Congress was even aware that in enacting 9(h) it was trenching upon constitutionally protected freedoms. Hence the provision was never considered there upon the basis of whether some grave evil existed which could be cured only at the cost of some impairment of freedom of thought, speech, assembly and political activity. Had Congress considered the issue in those terms, had it found that some substantial and immediate danger could be met only by restraining normally protected freedoms, a very different question would be presented to this Court.

But Congress proceeded in no such fashion. The House purportedly was disturbed about political strikes—though the last one cited to it had occurred in 1941. Political strikes, as far as we have found, were not even mentioned in the Senate. That body seems to have adopted 9(h)—after only the most perfunctory consideration[34]—simply because it wanted to weaken the power of adherents of a party which it detested and distrusted. That these people might have constitutional rights was not so much as mentioned.[35]

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[34] The provision was introduced on the floor of the Senate as an amendment, and was passed after only cursory discussion. See 93 Cong. Rec. 5095.

[35] With Congress so cavalierly abdicating its constitutional obligation to respect the political freedom even of unpopular minorities, it is not surprising to find that minor government functionaries are acting in the same way. Thus the Police Commissioner of Detroit is now requiring newspaper reporters covering police news to take an oath similar to that required by 9(h). The nation's newspapers, which have made no audible outcry against Section 9(h), have been quick to perceive the

The Board, in its defense of 9(h), has likewise found slight factual justification for impairing normally protected civil rights, and has groped for some sleight of hand argument by which to avoid consideration of the constitutional issues on their merits.

In this context, the issue before the Court is not a difficult one. It has simply no basis for sustaining 9(h): neither Congress nor the Board has supplied one. If it should hereafter appear that some major national interest is indeed gravely imperiled by the activities—not the beliefs—of communist labor leaders, it will always be open to Congress to enact, after adequate consideration, a measure genuinely designed to cope with the evil. And such a statute would present a question wholly different from that at issue here.

Even if political strikes were a grave threat to national security or industrial peace, a statute like 9(h) could not be sustained. The proper remedy would be to prohibit political strikes: not gratuitously to flout the guarantees of the First Amendment by barring members of a particular political party from serving as union officers. That union officers who are members of that party might sometimes resort to political strikes would not justify their expulsion from union office. For the supposed evil could be cured by a narrower remedy not involving political discrimination: that is, by forbidding political strikes.

Statutes restrictive of civil rights protected by the Constitution are upheld, if at all, only if they are "narrowly drawn to cover the precise situation giving rise to the danger." *Thornhill* v. *Alabama*, 310 U. S. 88, 105. But Section 9(h) does not limit itself to the claimed danger—political strikes.

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grave constitutional issues raised by the Police Commissioner's extension of 9(h)'s policy to them. See e.g., N. Y. *Times*, January 25, 1949, p. 26; San Francisco *Chronicle*, January 25, 1949, p. 18 (Editorial). The *Chronicle* editorial declares:

> Since the Communist party is still a lawful political party in Detroit and throughout the country we are not ready to concede that membership in the party itself is legitimate ground upon which a city official may direct publishers to dismiss police reporters. But for a city official to establish the taking of an oath composed by himself as the test of whether a reporter may report upon certain phases of the public domain is an arbitrary and ominous restriction upon the freedom of the press.

The Taft-Hartley Act invalidates strikes for several purposes by unions not complying with 9(h), which are legal for complying unions. See *supra* pp. 17-18. But political strikes are not forbidden, even by non-complying unions.

The wholly indefensible character of 9(h) in this respect is strikingly demonstrated by the very argument which the Board (Bd. Br. 88-98) puts forward in its defense. This argument asserts initially that the Communist Party has a dual aspect: that while it is a political party it is also an organization utilizing "direct action," such as political strikes, to achieve its ends. The Board then concedes that the Communist Party is protected by the constitution in so far as it acts in its first capacity, viz., as a political party, so that adherence to its "political programs which are to be put into operation through governmental action" could not constitutionally be made the basis for government discrimination.

> Such government action is itself constitutionally protected, with the result that belief in such action, though bearing a reasonable relation to the action, cannot be made a basis for classification. [Br. 90].

But, the argument continues, the Communist Party in its second aspect enjoys no such constitutional protection, so that its "direct action" program may be checked by precautionary legislation. Hence:

> The appellants do not and could not successfully contend that political strikes are beyond the power of Congress to prohibit. [Br. 90].

All of this may be conceded, but it has no tendency to support 9(h). It is just when it reaches the point of fitting 9(h) into this pattern that the Board's argument collapses completely. For the final and decisive proposition in the Board's argument is that 9(h) does not strike at the political aspect of communism, but only as its "direct action" phase.

> To the extent that the Communist Party is a political organization, it is left free and unrestrained. Section 9(h) is thus not concerned with the Communist Party as a political organization. [Br. 92].

Again—

> The phase of Communist Party activities with which we are here concerned is the participation of its members in, and the incitement by its agents of, political strikes. [Br. 90].

This is, of course, nonsense. Section 9(h) does not penalize political strikes. It penalizes adherence to the Communist Party. That the distinction can and should be made between adherence to that party's political principles and participation in its "direct action" is perfectly clear from the Board's own argument. But when the Board asserts that Congress made that distinction in enacting 9(h) and struck only at the latter, it asserts the reverse of the truth. For what Congress did was just the opposite: it penalized adherence to the Communist Party or its beliefs, but did not deal at all with actual conduct.

The Board interweaves with the analysis described above the assertion that adherence to the political program of the Communist Party may be expected to lead to participation in its "direct action," and, therefore, that adherence to the political program can properly be the basis for hostile governmental discrimination:

> But when the action which is to be anticipated from the holding of a certain belief is not constitutionally protected, constitutional guarantees are not infringed when that anticipation of action by those holding certain views is made the basis for legislative classification. [Br. 90-91].

This argument is adequately answered by the Board's own admission that adherence to the political principles of communism is constitutionally protected, and can and must be distinguished from participation in "direct action." It is the particular vice of 9(h) that it aims not at conduct but at political affiliation. That is just why it is clearly unconstitutional.

> Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. [*Cantwell* v. *State of Connecticut*, 310 U. S. 296, 303-304.]

The Board also urges (p. 60) that Section 9(h) was intended,

inter alia, to expose the identity of union leaders who are communists, and that Congress has power to require the disclosure to employees of information which the latter may consider relevant in choosing their officers. But disclosure of the political and economic beliefs of union officers could be achieved simply by requiring them to state whether or not they are communists, or to what political party they adhere. Hence a statute whose primary objective is to force unions to remove communist officers, and which to that end penalizes unions for having such officers, is hardly to be sustained by treating it as if it merely required disclosure of political views.

CONCLUSION

For the reasons stated, it is submitted that Section 9(h) should be held unconstitutional.

Respectfully submitted,

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